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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention	Docket OST-95-232 -30
Air Transport Association of America: Agreement Relating to Liability Limitations of the Warsaw Convention	Docket OST-96-1607 - 4

CONSOLIDATED COMMENTS OF THE INTERNATIONAL CHAMBER OF COMMERCE

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DATED: August 21, 1996

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CONSOLIDATED COMMENTS OF THE
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Introduction and Summary of Position

On July 31, 1996, in the two dockets referenced above, the International Air Transport Association ("IATA") and the Air Transport Association ("ATA") sought approval and antitrust immunity for agreements among their airline members addressing the liability of carriers to their passengers following mishaps that occur on international flights. The agreements would abolish the $75,000 limitation on airline liability currently applicable under the Warsaw Convention to any passenger killed or injured on an international flight to or from the United States. Instead of being subject to that artificial cap and thus being virtually compelled to endure years of painful and costly

litigation for the purpose of surmounting it,[1] future claimants would be able to recover the full amount of their provable damages in the vast majority of cases without regard to whether the airline was at fault.

Pursuant to 14 C.F.R. § 303.42(a), the International Chamber of Commerce ("ICC") and its Commission on Air Transport hereby express their strong support for the agreements filed in the instant dockets and urge the Department to act swiftly to approve and immunize them. Although mishaps in aviation occur only rarely, these agreements will facilitate far more humane treatment of grieving family members in such circumstances than is possible under the current regime. The agreements clearly qualify for approval and immunity pursuant to the applicable statutory tests.

Interest of the ICC

Founded in 1919, the ICC is a non-governmental organization of thousands of companies and business associations in more than 130 countries. ICC national committees in Europe, North and South America, the Middle East, Asia and the Pacific, and Africa

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[1] The $75,000 liability limit can be surmounted only if the passenger can prove that the mishap was attributable to "wilful misconduct" on the part of the airline -- an extremely difficult burden in most cases.

present ICC views to their governments and alert Paris headquarters to national business concerns.[2]

The ICC has top-level consultative status with the United Nations, including specialized U.N. agencies such as ICAO, where it advocates the interests of private enterprise in both developed and developing countries. ICC specialized commissions, made up of business experts, meet regularly to formulate policies on a broad range of issues affecting commerce, investment, government regulation, and business practices. Among the practical services offered to business by the ICC is the International Court of Arbitration.

The Commission on Air Transport is one of the ICC's specialized commissions. The only worldwide forum for all air transport interests, it regularly issues position papers on critical issues in international aviation. Its position papers include important statements on airline liability, both as related to passengers[3] and to cargo.[4]

As explained more fully in the following discussion, the agreements filed in the instant dockets respond favorably to the

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[2] The ICC national committee in the United States is the U.S. Council for International Business, based in New York.

[3] "Attempts to Preserve and Update the Warsaw System on Passenger Liability in International Air Transport," ICC Document No. 310/409 Rev. (1993).

[4] "Cargo and Baggage Liability in International Air Transport," ICC Document No. 310/415 Rev. 2 (1994).

main thrust of recommendations issued by the ICC Air Transport Commission, and pave the way for important and long overdue improvements in the regime for air cargo liability.

Discussion

1. Passenger liability

Under the Warsaw Convention, an airline's liability for a mishap occurring on an international flight is artificially capped at levels which, while varying according to country, are typically well below what most passengers would be entitled to by normal standards of accident compensation. That is particularly the case in the United States where, pursuant to an intercarrier agreement established in 1966 (the "Montreal Agreement"[5]), liability is capped at $75,000 per passenger. The only way a passenger or a passenger's family can recover more than $75,000 is by proving that the airline was guilty of "wilful misconduct," a difficult burden requiring long and expensive litigation.

The ICC over the years has consistently supported attempts to modernize the Warsaw system. Noting in 1993 that important amendments to the Warsaw Convention enshrined in Montreal Protocol 3, dealing with the liability of airlines to their passengers, appeared to face continuing delay and possible rejection, the ICC expressed its conviction that new ways had to

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[5]Agreement CAB 18900, approved by Order E-23680, May 13, 1966.

be found to break the deadlock in attempts to update the Warsaw regime. The ICC expressed particular concern at that time about the threat to the Warsaw system posed, paradoxically, by an increasing proliferation of well-intentioned efforts by airlines to provide fairer treatment for passengers and their families on a unilateral basis -- initiatives that reflected a growing frustration among airlines with the inadequacies of the Warsaw regime. This trend had begun to create serious uncertainty as to the rules applicable to a given mishap, or even to a given passenger.

It was the ICC's view that an effort should be undertaken to find a solution that would increase the passenger liability limit without destroying the global uniformity that has long been the hallmark of the Warsaw framework. The ICC wrote:

> In that context, the ICC wishes to draw attention to the concept of Intercarrier Agreements as a way of increasing the total amount of compensation which is readily available to each individual claimant as it adds a "second tier" of contractually agreed liability in excess of the underlying treaty defined "first tier."[6]

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[6] ICC Document No. 310/409 Rev. (1993). The ICC also recommended consideration of passenger-paid insurance as an optional "third tier" to be offered by airlines, either voluntarily or pursuant to a regulatory requirement. The pending agreements do not rely to any extent on the availability of passenger-paid insurance; the "second tier" (compensation paid by airlines) envisioned by the pending agreements would include all of the compensation envisioned in the ICC's suggested "third tier" but without the need for passenger-paid insurance. The agreements are thus a more attractive proposition for passengers.

The ICC noted that an agreement similar to the Montreal Agreement of 1966, but with a substantially higher limit and a wider geographical scope, would offer at least temporary relief.

The agreements filed in the instant dockets respond fully to the central concerns expressed by the ICC, and thus to the principal deficiencies of the current Warsaw system. They create a regime similar to that established by the 1966 Montreal Agreement but establish no limit on liability and have a wider geographical scope. They would create a dramatically improved regime.

The submissions of IATA and ATA spell out in appropriate detail the salient features of the agreements. It may be useful, however, to emphasize their most important departures from the current framework:

- First, the agreements effectively provide for payment of all provable damages. They abolish the current $75,000 limit of liability.

- Second, in the vast majority of cases, the only issue that would have to be settled between claimant and carrier would be the appropriate measure of damages. Claimants would no longer bear the burden of having to prove that the carrier was guilty of "wilful misconduct" in order to qualify for full compensatory damages.

- Third, claims would be settled quickly. Where a claimant decides to resort to litigation, that litigation would be relatively brief and straightforward. Moreover, alternatives to litigation may well be available even where the carrier and claimant are unable to reach a quick agreement on the measure of damages: The ICC's International Court of Arbitration has been working with IATA to create an arbitration mechanism for the expeditious determination of damages at a location to be selected in a manner

acceptable to the claimant. See IATA Application at 5, n. 5.

Clearly, the regime that will come into effect with the approval and immunization of the intercarrier agreements filed in the instant dockets will facilitate humane treatment for the vast majority of claimants, obviate years of painful and costly litigation, put full compensatory damages in the hands of claimants promptly, and thus achieve at long last a U. S. public policy goal of long standing.[7] There can be no question that these agreements, achieving an objective pursued by governments for more than twenty years but beyond reach until now, are "necessary to meet a serious transportation need to achieve important public benefits," within the meaning of 49 U.S.C § 41309(b)(1)(A).

The agreements are unlikely to have any impact on competition, for airlines do not compete, and are not likely to compete, on the basis of benefits provided in the event of an accident. Furthermore, the statistical likelihood of an accident occurring on any commercial flight is so insignificant that passengers are unlikely ever to factor such an issue into their choice of carrier. Thus, because the subject intercarrier agreements cannot be said to be "anticompetitive" at all in any

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[7] See, e.g., The Clinton Administration's Initiative to Promote a Strong Competitive Aviation Industry, January 1994, at 19; Report of the National Commission to Ensure a Strong Competitive Airline Industry, August 1993, at 23; Report of the President's Commission on Aviation Security and Terrorism, May 1990, at 106.

meaningful sense of the term, the Department can find with confidence that the important transportation need met by these agreements "cannot be achieved by reasonably available alternatives that are materially less anticompetitive," within the meaning of 49 U.S.C. § 41309(b)(1)(B) (emphasis added).

2. Cargo liability

In today's trade environment, manufacturers increasingly seek to take advantage of just-in-time delivery, Electronic Data Interchange ("EDI"), and related strategies as ways of enhancing efficiency and reducing the cost of production and transport. Essential to the successful exploitation of these innovations is a replacement of the traditional air waybill document with an electronic standard message communicated via EDI.

Unfortunately, carriers and agents who attempt to take advantage of state-of-the-art electronic messaging in the transport of freight by air expose themselves to the risk of unlimited liability for damage and/or delay because of a glaring anachronism: an electronic message does not satisfy the documentation requirements for air freight set forth in the 1929 Warsaw Convention. As a result, even though the required technology has been in place for some time, industry is unable to exploit fully, and consumers are unable to benefit from, the dramatic economies it offers.

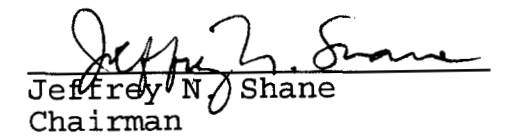
The only effective means of addressing this issue in a comprehensive way is through ratification of Montreal Protocol 4, setting forth amendments to the Warsaw Convention adopted more than twenty years ago but not yet in effect. Ratification of these changes -- which would bring electronic documentation into the Warsaw regime -- has been held up not because of any doubt about their importance or desirability, but because Montreal Protocol 4, dealing with air cargo, has been linked with Montreal Protocol 3, which deals with the far more sensitive and controversial issues associated with airline passenger liability.

The Department's approval and immunization of the intercarrier agreements filed in the instant dockets would resolve the controversy over passenger liability. It would then be possible to "de-link" the cargo protocol and ratify it separately. Similarly, Montreal Protocols 1 and 2, which substitute Special Drawing Rights as a unit of compensation for the traditional gold franc, can also be adopted for cargo purposes.

The ICC and its U.S. affiliate, the U.S. Council for International Business, have long advocated this long overdue modernization of the cargo liability regime. Once the subject intercarrier agreements are in effect, the ICC will renew its call for U.S. ratification of Warsaw Convention amendments relating to cargo without further delay.

WHEREFORE, in the interest of bringing into effect long overdue improvements in the liability regime governing air passengers and air cargo, the International Chamber of Commerce and its Commission on Air Transport urge the Department in the strongest possible terms to act favorably and promptly on the applications of IATA and ATA filed in the instant dockets.

Respectfully submitted,



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DATED: August 21, 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 1996, I caused copies of the foregoing "Consolidated Comments of the International Chamber of Commerce" to be delivered via first-class mail, postage prepaid, to each party on the attached Service List.

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